

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANASTACIA RAMIREZ,

Plaintiff,

LITTLE CAESARS ENTERPRISES,
INC. et al.,

Defendants.

Case No. 2:18-cv-07993-AB-JPR

**ORDER DENYING MOTION TO
REMAND, GRANTING MOTION TO
DISMISS INDIVIDUAL
DEFENDANTS RUBY RODRIGUEZ
AND AMANDA KIRKPATRICK,
AND DENYING MOTIONS TO
QUASH FOR INSUFFICIENT
SERVICE OF SUMMONS ON RUBY
RODRIGUEZ AND AMANDA
KIRKPATRICK**

I. INTRODUCTION

Before the Court is (1) Plaintiff Anastacia Ramirez’s (“Plaintiff”) Motion to Remand this case to state court and Request for Reimbursement of Costs and Fees in the Amount of \$20,250.00 (Dkt. No. 34 (hereinafter, “Mot. to Remand”)); (2) Defendant Little Caesars Enterprises Inc.’s (“Little Caesars”) Motion to Quash for Insufficient Service of Summons on Individual Defendant Amanda Kirkpatrick (Dkt. No. 16); (3) Little Caesars’s Motion to Quash for Insufficient Service of Summons on Individual Defendant Ruby Rodriguez (Dkt. No. 17); and (4) Little Caesars’s Motion to Dismiss Individual Defendants Ruby Rodriguez and Amanda Kirkpatrick (Dkt. No. 18). All motions are opposed. (Dkt. Nos. 23-24, 35.) The Court heard argument on the motions on October 26, 2018 and took the matter under submission. Having

1 carefully reviewed the parties' submissions and considered the arguments presented
2 during oral argument, and for the reasons indicated below, the Court **DENIES**
3 Plaintiff's Motion to Remand, **GRANTS** Little Caesars's Motion to Dismiss, and
4 **DENIES** Little Caesars's Motions to Quash as moot.

5 **II. BACKGROUND**

6 **A. Factual Background**

7 This lawsuit involves an employment dispute arising from Defendant Little
8 Caesars's alleged wrongful termination of Plaintiff. (See Dkt. No. 1 (hereinafter,
9 "Removal"), Ex. A (hereinafter, "Compl.").)

10 Plaintiff is, and at all relevant times was, a California resident. (Compl. ¶ 15.)
11 Little Caesars is, and at all relevant times was, incorporated in Michigan and has its
12 principal place of business in Michigan. (See Removal at 10.) Amanda Kirkpatrick
13 and Ruby Rodriguez (collectively, "the Individual Defendants") are, and at all
14 relevant times were, California residents. (Compl. ¶ 16.)

15 Plaintiff, a fifty-six-year-old Hispanic woman, began working for Little
16 Caesars in April 2006. (Compl. ¶¶ 1-2.) Plaintiff alleges that Individual Defendant
17 Kirkpatrick became a store manager for Little Caesars in 2016 and began mistreating
18 Plaintiff shortly thereafter. (Compl. ¶¶ 3-4, 10.) Plaintiff further alleges that
19 Kirkpatrick conspired with assistant manager and Individual Defendant Rodriguez
20 "to fabricate a reason to terminate Plaintiff's employment." (Compl. ¶ 10.)
21 According to Plaintiff, Little Caesars terminated Plaintiff's employment on June 2,
22 2016 after a series of work-related conflicts. (Compl. ¶ 13.)

23 **B. Procedural History**

24 Plaintiff initiated this action on May 24, 2018, in the Los Angeles Superior
25 Court against Little Caesars and the Individual Defendants. (See generally Compl.)
26 Plaintiff alleges the following thirteen causes of action: (1) breach of express and
27 implied contract; (2) breach of the covenant of good faith and fair dealing; (3)
28 wrongful termination in violation of public policy; (4) discrimination in violation of

1 Article I, Sections 1 and 8 of the California Constitution; (5) violation of California
2 Government Code section 12900; (6) intentional infliction of emotional distress
3 (“IIED”); (7) negligent management; (8) failure to conduct disability evaluation and
4 provide accommodation, leave, and equal pay in violation of Business & Professions
5 Code section 17200; (9) fraud, negligent misrepresentation, and concealment; (10)
6 failure to provide timely accurate pay, safe sanitary workplace, and accurate
7 personnel and pay records; (11) violations of California Labor Code sections 221,
8 224, and 1102.5(b) and (d); (12) failure to provide equal pay in violation of
9 California Labor Code section 1197; (13) failure to provide or pay for rest breaks,
10 meal periods, and overtime. (Compl. ¶¶ 1, 24-126.) Of these thirteen causes of
11 action, only causes of action four through nine are against the Individual Defendants.
12 (See Compl. ¶¶ 46-101.)

13 On August 9, 2018, Plaintiff indicates that she served the Individual
14 Defendants with the Complaint. On August 15, 2018, Plaintiff served the Summons
15 and Complaint on Little Caesars. On September 12, 2018, Defendant removed the
16 case to this Court based on diversity jurisdiction pursuant to 28 U.S.C. § 1332.
17 Shortly thereafter, Plaintiff moved to remand this case and Little Caesars moved to
18 quash for insufficient service on the Individual Defendants and to dismiss the
19 Individual Defendants. (Dkt. Nos. 16-18, 34.)

20 **III. LEGAL STANDARD**

21 **A. Removal**

22 Under 28 U.S.C. § 1441(a), a civil action may be removed to the district court
23 where the action is pending if the district court has original jurisdiction over the
24 action. Under 28 U.S.C. § 1332, a district court has original jurisdiction of a civil
25 action where the matter in controversy exceeds the sum or value of \$75,000, exclusive
26 of interest and costs, and the dispute is between “citizens of different states.” Section
27 1332 requires complete diversity, i.e., that “the citizenship of each plaintiff is diverse
28 from the citizenship of each defendant.” *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 67-68

1 (1996). Section 1441 limits removal to cases where no defendant “properly joined
2 and served . . . is a citizen of the State in which such action is brought.” 28 U.S.C.
3 § 1441(a)(b)(2). Section 1446(b) governs the timeliness of removals. If the case
4 stated by the initial pleading is “removable on its face,” then a defendant has thirty
5 days from receipt of the pleading to remove the case. *Carvalho v. Equifax Info. Servs.,*
6 *LLC*, 629 F.3d 876, 884-85 (9th Cir. 2010).

7 Removal statutes are “strictly construe[d] against removal.” *Gaus v. Miles,*
8 *Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). Federal jurisdiction must be rejected if there
9 is any doubt as to the right of removal in the first instance. *Id.* Accordingly, the
10 removing party bears a heavy burden of establishing original jurisdiction in the district
11 court. *Id.*

12 **B. Fraudulent Joinder**

13 A non-diverse party may be disregarded for purposes of determining whether
14 jurisdiction exists if the court determines that the party’s joinder was “fraudulent” or a
15 “sham.” *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001);
16 *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998); *McCabe v. Gen.*
17 *Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987). The term “fraudulent joinder” is a
18 term of art and does not connote any intent to deceive on the part of plaintiffs or their
19 counsel. *Lewis v. Time Inc.*, 83 F.R.D. 455, 460 (E.D. Cal. 1979), *aff’d*, 710 F.2d 549
20 (9th Cir. 1983). The relevant inquiry is whether plaintiff has failed to state a cause of
21 action against the non-diverse defendant, and the failure is obvious under settled state
22 law. *Morris*, 236 F.3d at 1067; *McCabe*, 811 F.2d at 1339.

23 The burden of proving fraudulent joinder is a heavy one. The removing party
24 must prove that there is “no possibility that plaintiff will be able to establish a cause of
25 action in State court against the alleged sham defendant.” *Good v. Prudential Ins. Co.*
26 *of Am.*, 5 F. Supp. 2d 804, 807 (N.D. Cal. 1998). In this regard, “[r]emand must be
27 granted unless the defendant shows that the plaintiff ‘would not be afforded leave to

1 amend his complaint to cure [the] purported deficiency.”” *Padilla v. AT & T Corp.*,
2 697 F. Supp. 2d 1156, 1159 (C.D. Cal. 2009); *Macey v. Allstate Prop. & Cas. Ins. Co.*, 220 F. Supp. 2d 1116, 1117 (N.D. Cal. 2002) (“If there is a non-fanciful
3 possibility that plaintiff can state a claim under California law against the non-diverse
4 defendants the court must remand.”).

6 **IV. DISCUSSION**

7 Plaintiff, who is domiciled in California, provides three principal arguments as
8 to why the Court should remand this case: (1) removal was untimely; (2) Little
9 Caesars has failed to establish that the amount in controversy in this case exceeds
10 \$75,000; and (3) the Individual Defendants destroy complete diversity and are not
11 “sham” defendants. As explained below, the Court finds Little Caesars timely
12 removed this case to federal court, the Individual Defendants are sham defendants;
13 thus, complete diversity is not destroyed, and the Court has subject matter jurisdiction.
14 The Court also finds that the Individual Defendants have not been properly served.¹

15 **A. Removal Was Timely**

16 Plaintiff argues that remand is warranted because removal was untimely.
17 Specifically, Plaintiff argues that the thirty-day clock started to run on August 9, 2018
18 when Plaintiff allegedly served the Individual Defendants with the Complaint, rather
19 than August 15, 2018 when Plaintiff served Little Caesars with the Complaint. (Mot.
20 to Remand at 4.) In its opposition, Little Caesars argues formal service of the
21 summons and complaint—not “receipt”—is what triggers the thirty-day time limit.
22 (See Dkt. No. 35 at 20.)

23 “The U.S. Supreme Court has determined that formal service is necessary to
24 trigger the 30-day time-limit.” *Gonzalez v. Lightcap*, No. LA18CV01236VAPSHKX,
25

26 ¹ Plaintiff also argues the Notice of Removal is defective because Little Caesars failed
27 to file all state court pleadings in this action and the Individual Defendants failed to
28 join in removal. (See Dkt. No. 15.) The Court will address Plaintiff’s additional
arguments in the course of addressing the three principal arguments.

1 2018 WL 3753019, at *2-3 (C.D. Cal. Aug. 7, 2018) (citing *Murphy Bros. v. Michetti*
2 *Pipe Stringing, Inc.*, 526 U.S. 344, 347-48 (1999)); *see also Coleman v. Labor &*

3 *Indus. Review Comm'n of Wis.*, 860 F.3d 461, 472 (7th Cir. 2017), *cert. denied*, 138 S.

4 Ct. 739 (2018) (“[S]omething as important as the choice between a state court and a

5 federal court . . . cannot be resolved against a party without bringing the party into the

6 case through formal service of process.”); *Zahn v. T.B. Penick & Sons, Inc.*, No.

7 11CV1322 AJB, 2011 WL 5118751, at *2 (S.D. Cal. Oct. 27, 2011) (“[I]t is not

8 enough for Plaintiff to show that Defendant actually received a copy of the complaint

9 by a particular date. Plaintiff must demonstrate compliance with the requirements of

10 service.”). When the grounds for removal is apparent on the face of the complaint, as

11 it is here, there are four possibilities for when the thirty-day clock starts to run:

12 First, if the summons and complaint are served together, the 30-day period
13 for removal runs at once. Second, if the defendant is served with the
14 summons but the complaint is furnished to the defendant sometime after,
15 the period for removal runs from the defendant’s receipt of the complaint.
16 Third, if the defendant is served with the summons and the complaint is
17 filed in court, but under local rules, service of the complaint is not required,
18 the removal period runs from the date the complaint is made available
19 through filing. Finally, if the complaint is filed in court prior to any service,
20 the removal period runs from the service of the summons.

21 *Murphy Bros.*, 526 U.S. at 354.

22 Plaintiff has the burden to show service of the summons and complaint was
23 effective. *Gonzalez*, 2018 WL 3753019, at *2-3; *see Zahn*, 2011 WL 5118751, at *2;
24 *Roylance v. ADT Sec. Servs., Inc.*, No. C 08-1101 JF (RS), 2008 WL 2444795, at *2
25 (N.D. Cal. June 16, 2008). Plaintiff previously lodged the proofs of service of the
26 summons and complaint on the Individual Defendants dated August 9, 2018. (Dkt.
27 No. 15.) With respect to timeliness, Plaintiff contends that “[t]hese proofs of service
28 establish that Defendant was aware of this action . . . when the Summons and
Complaint was served on it’s [sic] employees at it’s [sic] Corona location on August
9, 2018.” (*Id.*) Plaintiff further alleges that “Defendant has withheld these pleadings

1 because they establish that the notice of removal filed September 12, 2018 is
2 untimely.” (*Id.* at 2.) Thus, Plaintiff’s theory is that Little Caesars was effectively
3 “served” with the complaint on August 9—the date that the Individual Defendants
4 were allegedly served—because Little Caesars knew about the complaint against it.
5

6 To determine that the date of service was the date Plaintiff allegedly served the
7 Individual Defendants would conflict with the central holding of *Murphy Bros.*, 526
8 U.S. 344, which held that formal process was necessary to establish the thirty-day
9 removal deadline. In *Murphy Bros.*, the plaintiff filed a complaint in state court and
10 faxed a courtesy copy of the file-stamped complaint to the vice president of the
11 defendant company two weeks before officially serving the defendant by certified
12 mail. *Id.* at 348.

13 Defendant filed the notice of removal thirty days after service, but forty-four
14 days after receipt of the faxed copy of the complaint. *Id.* The Court noted that
15 “nothing in the legislative history . . . so much as hints that Congress . . . intended to
16 dispense with the historic function of service of process as the official trigger for
17 responsive action by an individual or entity named defendant.” *Id.* at 352-53. The
18 Court held “mere receipt of the complaint unattended by any formal service” does not
19 trigger the thirty-day time limit. *Id.* at 347-48.

20 Accordingly, the Court finds that service was effective on Little Caesars on
21 August 15, 2018—the date Little Caesars was formally served with the summons and
22 complaint. Little Caesars filed its notice of removal on September 12, 2018, less than
23 thirty days after service was effective. Thus, removal was timely.²
24
25
26

27 ² The Court declines to take judicial notice of the court’s order to show cause in *Sean*
28 *P. Harper v. Little Caesar Enterprises, Inc.* Case No. 18-01564 that is attached to
Plaintiff’s counsel’s declaration as exhibit B. (Dkt. No. 34-1 at 2-3.) That case is
neither related to this case nor relevant to the issues before the Court.

B. The Individual Defendants Are Sham Defendants³

Little Caesars bears the burden of demonstrating that the Individual Defendants, who are both California citizens and would destroy diversity, are sham defendants.⁴ See *Gaus*, 980 F.2d at 566 (noting that a defendant has the burden of establishing that removal is proper). To support a claim that a non-diverse defendant has been fraudulently joined, the removing party must show that the plaintiff has failed to state

³ At the hearing on October 26, 2018, Plaintiffs' counsel requested the Court consider supplemental briefing on whether the Individual Defendants are sham defendants. Plaintiff argued that she had no notice that Little Caesars would argue the Individual Defendants were sham defendants until Little Caesars filed its opposition to the Motion to Remand, which was filed on October 19, 2018 pursuant to a condensed briefing schedule. (See Dkt. No. 35.) Plaintiff further argued that ruling on the merits without considering supplemental briefing on the issue, violates Plaintiff's right to due process because Plaintiff did not have sufficient time to address the sham defendant argument in the reply brief. The Court disagrees. Plaintiff was on notice of the sham defendant issue on September 19, 2018, when Little Caesars's filed its Notice of Removal. The Notice of Removal specifically states: "Because they are sham defendants, the court must disregard the citizenship of Ms. Ruby Rodriguez and Ms. Amanda Kirkpatrick, for purposes of diversity. Plaintiff asserts six claims against Ms. Rodriguez and Ms. Kirkpatrick, all of which fail. They are not supported by sufficient facts, not supported as a matter of law, and are precluded by California's Workers' Compensation Act." (Dkt. No. 1 at 5.) Plaintiff was also on notice after reviewing Little Caesars's opposition to Plaintiff's Ex Parte Application to Remand, which was filed on October 15, 2018. (See Dkt. No. 32.) Plaintiff cannot use notice as both a shield and a sword.

⁴ Little Caesars's memorandum of points and authorities in support of its motion to dismiss the Individual Defendants thoroughly addresses the merits of all causes of action against the Individual Defendants. (See Dkt. No. 25-1 (hereinafter, "Rivera Decl.").) Plaintiff focuses primarily on technical deficiencies to challenge removal and does not address in detail the merits of her claims against the Individual Defendants. For example, Plaintiff points out that Little Caesars filed the Notice of Motion to Dismiss on September 19, 2018 and failed to attach the corresponding memorandum of points and authorities. (Dkt. No. 31 at 1-2.) On October 10, 2018, Little Caesars filed a Notice of Errata, attaching the memorandum of points and authorities and explaining it inadvertently forgot to attach the supporting papers. (Rivera Decl. ¶¶ 3-5.) Shortly thereafter, Plaintiff filed a supplemental opposition characterizing this error as a "bad faith tactic" and requesting that the Court strike the Notice of Errata and memorandum of points and authorities pursuant to Local Rule 7-5. (Dkt. No. 31 at 1-2.) The Court declines to do so. See C.D. Cal. L.R. 7-4 ("The Court *may* decline to consider a motion unless it meets the requirements of L.R. 7-3 through 7-8") (emphasis added).

1 a valid cause of action against that non-diverse defendant, and the “settled rules of the
2 state” must make the failure evident by clear and convincing evidence. *See Hamilton*
3 *Materials, Inc. v. Dow Chem. Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007) (internal
4 quotation marks omitted). When determining whether this burden has been met, courts
5 may look to the face of the plaintiff’s complaint as well as to additional “summary
6 judgment type evidence.” *Morris*, 236 F.3d at 1068.

7 **1. Claim Based on Violations of Article I, Sections 1 and 8
8 of the California Constitution (Fourth Cause of Action)**

9 Plaintiff claims that the Individual Defendants violated her right to privacy
10 under Article I, Sections 1 and 8 of the California Constitution for discrimination
11 and/or retaliation.⁵

12 Article I, section 1 provides: “All people are by nature free and independent and
13 have inalienable rights. Among these are enjoying and defending life and liberty,
14 acquiring, possessing, and protecting property, and pursuing and obtaining safety,
15 happiness, and privacy.” The California Constitution creates a privacy right that
16 protects individuals from the invasion of their privacy not only by state actors but also
17 by private parties. *Am. Acad. of Pediatrics v. Lungren*, 16 Cal. 4th 307 (1997); *Leonel*
18 *v. Am. Airlines, Inc.*, 400 F.3d 702, 711-12 (9th Cir. 2005), *opinion amended on*
19 *denial of reh’g*, 03-15890, 2005 WL 976985 (9th Cir. Apr. 28, 2005). To prove a
20 claim under the California Constitutional right to privacy, a plaintiff must first
21 demonstrate three elements: (1) a legally protected privacy interest; (2) a reasonable
22 expectation of privacy under the circumstances; and (3) conduct by the defendant that
23 amounts to a serious invasion of the protected privacy interest. *Hill v. Nat’l Collegiate*
24 *Athletic Ass’n*, 7 Cal. 4th 1, 35-37 (1994). “These elements do not constitute a
25 categorical test, but rather serve as threshold components of a valid claim to be used to
26 ‘weed out claims that involve so insignificant or de minimis an intrusion on a

27
28 ⁵ Plaintiff provides few factual allegations to support this cause of action. (See
Compl. ¶¶ 46-47.)

1 constitutionally protected privacy interest as not even to require an explanation or
2 justification by the defendant.”” *In re iPhone Application Litig.*, 844 F. Supp. 2d
3 1040, 1063 (N.D. Cal. 2012) (quoting *Loder v. City of Glendale*, 14 Cal. 4th 846
4 (1997)).

5 Assuming, without deciding, that Plaintiff has established elements one and
6 two, Plaintiff’s claim fails under element three because the Individual Defendants’
7 conduct is not “sufficiently serious in their nature, scope, and actual or potential
8 impact to constitute an egregious breach of the social norms underlying the privacy
9 right.” *Hill*, 7 Cal. 4th at 26, 37. Plaintiff alleges that, “as a woman whistleblower,
10 they interfered with her rights to pursue her profession, vocation, and employment.”
11 (Compl. ¶ 46.) Plaintiff has plead no facts in the entire complaint, that “amounts to a
12 serious invasion” of the protected privacy interest.

13 Article I, section 8 provides: “A person may not be disqualified from entering
14 or pursuing a business, profession, vocation, or employment because of sex, race,
15 creed, color, or national or ethnic origin.” Plaintiff has alleged no facts suggesting the
16 Individual Defendants terminated her employment for any of the enumerated reasons.

17 After considering and accepting as true the allegations in the complaint and
18 briefing, as well as the allegations presented at the hearing, the Court finds Plaintiff’s
19 constitution-based claims fail and that Plaintiff cannot possibly cure the deficiencies
20 by amending the complaint.

21 **2. Harassment Claims (Fifth Cause of Action)**

22 Plaintiff claims that the Individual Defendants harassed her for “taking medical
23 leave . . . by refusing her evaluation and accommodation” in violation of FEHA.
24 (Compl. ¶ 51.) FEHA makes it unlawful for an “an employer . . . or any other
25 person,” to harass an employee because of age, disability, or medical condition. Cal.
26 Gov. Code § 12940(j)(1). Under FEHA, “harassment” includes: (a) [v]erbal
27 harassment, e.g. epithets, derogatory comments or slurs on a basis enumerated in the
28 Act; (b) physical harassment, e.g. assault, impeding or blocking movement, or any

1 physical interference with normal work or movement, when directed at an individual
2 on a basis enumerated in the Act; [or] (c) visual forms of harassment, e.g. derogatory
3 posters, cartoons, or drawings . . .” Cal. Code Regs. Tit. 2 § 11019, subd. (b)(1).

4 To constitute harassment, conduct must be “sufficiently severe or pervasive to
5 ‘alter the conditions of [the victim’s] employment and create an abusive work
6 environment,’ and it excludes conduct that is “occasional, isolated, sporadic, or
7 trivial.” *Fisher v. San Pedro Peninsula Hosp.*, 214 Cal. App. 3d 590, 609 (Cal. Ct.
8 App. 1989) (citations omitted). California law recognizes that “harassment by a high-
9 level manager of any organization may be more injurious to the victim because of the
10 prestige and authority that the manager enjoys.” *Roby v. McKesson Corp.*, 47 Cal. 4th
11 686, 709 (2009).

12 Significantly, California law distinguishes between discriminatory employment
13 actions and harassment. Under FEHA, is it unlawful for “an employer” to
14 discriminate, but it is unlawful for “an employer . . . or any other person” to harass.
15 See Cal. Gov. Code. §§ 12941, 12940 (emphasis added). Thus, only an employer—
16 and not individuals—can be held liable for discriminatory employment actions,
17 typically through a claim for employment discrimination. By contrast, an individual
18 employee, in addition to an employer, can be held liable for harassment. How this
19 distinction applies to this case is the issue central to this motion. In *Janken v. GM
Hughes Electronics*, 46 Cal. App. 4th 55 (1996), the court provided a succinct
21 explanation of the distinction, which is worth quoting in full:

22 [T]he Legislature intended that commonly necessary personnel
23 management actions such as hiring and firing, job or project assignments,
24 office or work station assignments, promotion or demotion, performance
25 evaluations, the provision of support, the assignment or nonassignment of
26 supervisory functions, deciding who will and who will not attend meetings,
27 deciding who will be laid off, and the like, do not come within the meaning
28 of harassment. These are actions of a type necessary to carry out the duties
of business and personnel management. These actions may retrospectively
be found discriminatory if based on improper motives, but in that event the
remedies provided by the FEHA are those for discrimination, not

1 harassment. Harassment, by contrast, consists of actions outside the scope
2 of job duties which are not of a type necessary to business and personnel
3 management. This significant distinction underlies the differential
4 treatment of harassment and discrimination in the FEHA.

5 *Janken*, 46 Cal. App. 4th at 64-65.

6 Here, all of the actions that Plaintiff alleges the Individual Defendants engaged
7 in or failed to engage in are properly categorized as management actions, including
8 responding to employee complaints, determining whether to conduct investigations
9 into complaints, calling employees into their office and asking why an employee has
10 overtime, requesting that employees sign documents, declining evaluation and
11 accommodation for disabilities, and making decisions on whether to terminate an
12 employee's employment. These are the kinds of "commonly necessary personnel
13 management actions" that may give rise to a claim against an employer for
14 employment discrimination, but that do not ordinarily give rise to a claim against
another employee for harassment.⁶

15 It is true that managers *may* be individually liable for harassment where their
16 personnel or management decisions "have a secondary effect of communicating a
17 hostile message. This occurs when the actions establish a *widespread* pattern of bias."
18 *Roby*, 47 Cal. 4th at 709 (emphasis added). And, a fact finder may look to both
19 categories of evidence—evidence of the manager's conduct falling outside his or her
20 necessary job duties *and* evidence of the manager's official actions—to determine

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22 ⁶ At the hearing on the motion, Plaintiff indicated that she could amend the complaint
23 and allege that Kirkpatrick witnessed, on at least one occasion, subordinates engaging
24 in behavior that constitutes harassment, but did not participate in the harassment or
say anything that would otherwise encourage the harassment. However, as noted by
25 Little Caesars, a supervisory employee is not liable under FEHA for failing to prevent
26 harassment by a subordinate employee, (Dkt. No. 25-1 at 5). *See Fiol v. Doellstedt*,
27 58 Cal. Rptr. 2d 308, 316 (1996) (concluding "[a] non-harassing supervisor who fails
to take action on a sexual harassment complaint by a subordinate has not engaged in
personal conduct constituting harassment, but rather has made a personnel
management decision which in retrospect may be considered inadequate or improper"
and that "[a] supervisor does not aid and abet a harasser by mere inaction"); *accord*
Zamora v. Sacramento Rendering Co., No. CIVS0500789DFLKJM, 2007 WL
137239, at *5 (E.D. Cal. Jan. 17, 2007).

1 whether an individual manager engaged in harassment. *Id.* at 707; *see also id.* at 709
2 (“discrimination and harassment claims can overlap as an evidentiary matter” because
3 evidence that a manager took adverse official actions “can provide evidentiary support
4 for a harassment claim by establishing discriminatory animus on the part of the
5 manager responsible for the discrimination, thereby permitting the inference that rude
6 comments or behavior by that same manager was similarly motivated by
7 discriminatory animus.”).

8 However, that management actions *can* be harassing or *can* be probative of
9 harassment in some cases does not mean that this is such a case. Stated simply,
10 viewing the complaint in the light most favorable to Plaintiff, the employment actions
11 alleged in the complaint do not plausibly have “a secondary effect of communicating a
12 hostile message.” *Roby*, 47 Cal. 4th at 709. They appear to be precisely the routine
13 personnel management activities attributable to the employer.

14 As the *Janken* court observed, the legislature itself distinguished between
15 FEHA discrimination claims and FEHA harassment claims, both with respect to what
16 conduct constitutes a violation, and with respect to who may be held liable for each
17 claim. It is important that the courts honor this distinction. However, honoring that
18 distinction when the issue is fraudulent joinder presents a challenge: it can be difficult
19 for a court to conclude that a plaintiff has *no possibility* of establishing a harassment
20 claim against a non-diverse individual defendant, even if most of that defendant’s
21 allegedly harassing conduct is primarily management activity. By the same token, the
22 law governing when management activity can give rise to a harassment claim makes
23 clear that the management activity must be harassing in some way. The activity
24 alleged in the complaint and at the hearing does not meet this standard. The Court
25 also notes that honoring the discrimination-harassment distinction has important
26 consequences where, as here, it appears that a plaintiff has haled two non-diverse
27 individual defendants into court based on unviable state law claims, simply to secure a
28 state court forum. Threatening an individual with liability that should properly attach

1 to his employer because it is based on employment-related activity subverts the logic
2 of FEHA. Plaintiffs who engage in such tactics should not be rewarded with their
3 preferred forum.

4 For the foregoing reasons, Plaintiff has not alleged a claim for harassment under
5 FEHA, nor can she by amending the complaint.

6 **3. IIED Claim (Sixth Cause of Action)**

7 To state a viable claim for IIED against one of the Individual Defendants,
8 Plaintiff must offer factual allegations demonstrating that: (1) the Individual
9 Defendant engaged in extreme and outrageous conduct with the intent to cause (or
10 reckless disregard for the probability of causing) severe emotional distress; (2)
11 Plaintiff suffered extreme or severe emotional distress; and (3) the Individual
12 Defendant's outrageous conduct was the actual and proximate cause of Plaintiff's
13 distress. *Christensen v. Superior Court*, 54 Cal. 3d 868, 903 (1991). To constitute
14 "outrageous," conduct the Individual Defendant's conduct "must be so extreme as to
15 exceed all bounds of that usually tolerated in a civilized community." *Id.* (quoting
16 *Davidson v. City of Westminster*, 32 Cal. 3d 197, 209 (1982)). Additionally, the
17 Individual Defendant must have engaged in such conduct "with the realization that
18 injury [would] result." *Id.* (quoting *Davidson*, 32 Cal.3d at 210).

19 Just as management conduct does not constitute harassment, "a simple pleading
20 of personnel management activity is insufficient to support a claim of intentional
21 infliction of emotional distress, even if improper motivation is alleged." *Janken*, 46
22 Cal. App. 4th at 80. "If personnel management decisions are improperly motivated,
23 the remedy is a suit against the employer for discrimination." *Id.*

24 As discussed above, Plaintiff's complaint is premised on personnel
25 management action and does not support a claim for IIED. Because these alleged
26 employment decisions occurred within the context of an employment relationship, any
27 IIED claim based on these actions is barred by the California Workers' Compensation
28 Act's exclusive remedies provision. *See Potter v. Ariz. S. Coach Lines, Inc.*, 202 Cal.

1 App. 3d 126, 133 (1988). And, just as the Individual Defendants' actions were not of
2 the quality or quantity to support a claim for harassment, they are also not outrageous
3 or so extreme as to exceed all bounds of that usually tolerated in a civilized
4 community. Thus, the complaint does not state an IIED claim against the Individual
5 Defendants.

6 **4. Negligent Management Claim (Seventh Cause of Action)**

7 Plaintiff sues the Individual Defendants for negligent management, alleging the
8 Individual Defendants breached their duty "to maintain a work environment free of
9 discrimination, harassment, and retaliation, to evaluate Plaintiff for accommodation,
10 and to hire and supervise employees in a manner likely to achieve that end." (Compl.
11 ¶ 64.)

12 Workers' compensation law bars negligence claims by employees against their
13 employers. *See Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.*, 14 Cal. App. 4th
14 1595, 1605-06 (1993) (stating that workers' compensation laws would bar negligent
15 supervision claim by harassed employee). Therefore, Plaintiff's claim for negligent
16 management against the Individual Defendants fails.

17 **5. Claim Based on Violations of Business and Professions
18 Code (Eighth Cause of Action)**

19 California's Unfair Competition Law ("UCL"), codified at Business &
20 Professions Code section 17200, *et seq.*, prohibits "any unlawful, unfair or fraudulent
21 business act or practice and unfair, deceptive, untrue or misleading advertising." The
22 UCL "borrows" violations of other laws and treats them as unlawful practices
23 independently actionable under the UCL. *Farmers Ins. Exch. v. Superior Court*, 2
24 Cal. 4th 377, 383 (1992).

25 To state a claim under the UCL, a plaintiff must first establish standing. A
26 plaintiff establishes standing under the UCL by alleging that he "has suffered injury in
27 fact and has lost money or property," Cal. Bus. & Prof. Code § 17204, and that the
28 defendant's conduct caused this injury. *Peterson v. Cellco P'ship*, 164 Cal. App. 4th

1 1583, 1592 (2008). Little Caesars argues Plaintiff has not established standing
2 because she has not shown any economic injury. (Dkt. No. 25-1.) The Court agrees.
3 Plaintiff alleges she “suffered losses” and “seeks disgorgement of any profit gained by
4 Defendants,” but it is unclear how any of the Individual Defendants’ alleged actions
5 caused Plaintiff economic injury. (Compl. ¶ 73.) Plaintiff’s loss of wages cannot be
6 attributed to the Individual Defendants solely because they told her Little Caesars was
7 terminating her employment. Plaintiff’s allegations are conclusory, and Plaintiff has
8 provided no facts that suggest Plaintiff could state a viable UCL claim in an amended
9 complaint.

10 **6. Fraud/Misrepresentation/Concealment Claim (Ninth
11 Cause of Action)**

12 Plaintiff’s ninth cause of action alleges that the Individual Defendants
13 committed fraud by intentional misrepresentation by “promis[ing] Plaintiff her
14 employment would continue and that she would be allowed to work regardless of her
15 age, disability, or perceived disability, and she would be evaluated for
16 accommodation.” (Compl. ¶ 76.) Plaintiff alleges “[t]his was untrue,” “Defendants . .
17 . knew their representations were false” and “Plaintiff relied on Defendants’ . . .
18 promises to her detriment as Defendants . . . failed to keep their promises. (Compl. ¶¶
19 76-77.)

20 To state a claim for fraud, a plaintiff must allege (1) a knowingly false
21 representation by the defendant; (2) an intent to deceive or induce reliance; (3)
22 justifiable reliance by the plaintiff; and (4) resulting damages. *Serv. by Medallion Inc.*
23 v. *Clorox Co.*, 44 Cal. App. 4th 1807, 1816 (1996). Fraud must be pled with
24 specificity; general and conclusory allegations will not suffice. *Lazar v. Superior*
25 *Court*, 12 Cal. 4th 631, 645 (1996). A plaintiff must plead facts that show “how,
26 when, where, to whom, and by what means” the representations were made. *Id.*
27 Furthermore, “[t]he requirement of specificity in a fraud action against a corporation
28 requires the plaintiff to allege the names of the persons who made the allegedly

1 fraudulent representations, their authority to speak, to whom they spoke, what they
2 said or wrote, and when it was said or written.” *Tarmann v. State Farm Mut. Auto.*
3 *Ins. Co.*, 2 Cal. App. 4th 153, 157 (1991).

4 Here, Plaintiff’s fraud claim is insufficiently pled. Plaintiff has failed to plead
5 the identity of the person or persons who made the representations. The complaint
6 also does not clearly plead, for each relevant representation, whether it was oral or
7 written. Finally, the complaint fails to plead facts showing justifiable reliance and
8 resulting damages because it does not plead that Plaintiff could have and would have
9 worked elsewhere but for the Individual Defendants alleged misrepresentation. The
10 complaint fails to plead with sufficient specificity the facts *showing* reliance and
11 damages.

12 Where a complaint includes causes of action sounding in fraud, including
13 claims for negligent misrepresentation and concealment, those allegations must also
14 be pleaded with particularity. Fed. R. Civ. P. 9(b). Plaintiff’s allegations are
15 conclusory and, like all of the other claims, Plaintiff has not and cannot plead
16 sufficient facts to support her claim based on fraud, negligent misrepresentation, and
17 concealment.

18 **C. The Amount in Controversy Requirement Is Met**

19 The Court must decide whether Little Caesars has demonstrated that the amount
20 in controversy exceeds \$75,000.⁷ Plaintiff’s complaint seeks damages for wages and
21 employment benefits, incidental expenses, emotional distress, attorneys’ fees,
22 prejudgment interest, and punitive damages, but does not specify the amounts sought.
23 (See Compl. ¶¶ 29, 43-45, 52, 59-60, 69, 74, 91-92, 100-01.) The Court finds Little
24 Caesars has satisfied its burden of plausibly alleging an amount in controversy

25
26

⁷ In Little Caesars’s opposition to the motion to remand, defense counsel proposed
27 that they would stipulate to the remand if Plaintiff would stipulate to damages less
28 than \$75,000. (Dkt. No. 35 at 1 n.1.) Plaintiff did not address this proposal in her
reply motion. (See Dkt. No. 36.)

1 exceeding \$75,000 in their Notice of Removal.⁸ Accordingly, the Court must weigh
2 the evidence and determine whether Defendants have met their burden, by a
3 preponderance of the evidence, that the jurisdictional amount in controversy is
4 satisfied.

5 **1. Lost Wages and Employment Benefits**

6 Little Caesars asserts that lost wages should be based on the length of time from
7 termination through the estimated date of trial. (Removal at 8.) The weight of
8 authority, however, requires the Court to ascertain jurisdiction at the *time of removal*.
9 *Fortescue v. Ecolab Inc.*, 2014 WL 296755, at *2 (C.D. Cal. Jan. 28, 2014) (“[I]n
10 determining the amount in controversy, the court declines to project lost wages
11 forward to some hypothetical trial date.”); *Soto v. Kroger Co.*, 2013 WL 3071267, *3
12 (C.D. Cal. 2013) (“[T]he guiding principle is to measure amount in controversy at the
13 time of removal.”); *Haase v. Aerodynamics Inc.*, No. 2:09-CV-01751-MCE-GG, 2009
14 WL 3368519, *4 (E.D. Cal. 2009) (“The amount in controversy must be determined at
15 the time of removal.”); *see Gardynski-Leschuck v. Ford Motor Co.*, 142 F.3d 955,
16 958 (7th Cir. 1998) (citing *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S.
17 283, 289-90, (1938)) (“[J]urisdiction depends on the state of affairs when the case
18 begins; what happens later is irrelevant.”); *see also Simmons v. PCR Tech.*, 209 F.
19 Supp. 2d 1029, 1032 (N.D. Cal. 2002) (limiting amount of lost wages considered in
20 amount in controversy to those accrued at time of removal).

21 In support of their Notice of Removal, Little Caesars submitted the declaration
22 of Human Resources Director Rebecca Adkins, in which she declared that on the date
23 of Plaintiff’s termination, Plaintiff’s hourly rate was \$10.00 per hour, she worked
24 approximately forty hours per week, and her weekly earnings amounted to \$400 per
25 week. (Dkt. No. 5 ¶¶ 1, 4.) Plaintiff was terminated on June 2, 2016, and Defendants

27 ⁸ In the motion to remand, Plaintiff argues “Defendant has provided no such evidence
28 in support of its [Notice of Removal], and merely speculates as to Plaintiff’s
damages.” (Mot. to Remand at 18.)

1 filed their Notice of Removal on September 12, 2018—a period of 118 weeks and six
2 days. (Compl. ¶¶ 13; Dkt. No. 1.) Therefore, based on Plaintiff’s \$400 weekly
3 earnings, her lost wages at the time of removal were at least \$47,200 (\$400 per week x
4 118 weeks).

5 Additionally, while the Court declines to quantify the exact value of Plaintiff’s
6 “other employment benefits,” they are more likely than not to be more than nominal.
7 *See Melendez v. HMS Host Family Rests., Inc.*, No. CV 11-3842 ODW CWX, 2011
8 WL 3760058, at *3 (C.D. Cal. Aug. 25, 2011) (the Court may also include other
9 benefits in the lost wages analysis). In other words, they are worth at least \$1.
10 Accordingly, the total amount of Plaintiff’s lost wages claim, for purposes of
11 jurisdiction, is at least \$47,201.

12 **2. Attorneys’ Fees**

13 “[W]here an underlying statute authorizes an award of attorneys’ fees, either
14 with mandatory or discretionary language, such fees may be included in the amount in
15 controversy.” *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156 (9th Cir. 1998).
16 While there is a split of authority about whether post-removal attorneys’ fees should
17 be included in the amount in controversy, recent cases in this district hold that post-
18 removal attorneys’ fees should be included. *See, e.g., Guytan v. Swift Transp. Co. of*
19 *Arizona, LLC*, No. 17-cv-00626-VAP (DTBx), 2017 WL 2380159, at *3 (C.D. Cal.
20 June 1, 2017). This Court has determined that “‘an appropriate and conservative
21 estimate’ for attorneys’ fees in employment cases in this district ‘may reasonably be
22 expected to equal at least \$30,000.’” *Id.* (citing *Sasso*, 2015 WL 898468, at *6); *see also Ponce v. Med. Eyeglass Ctr., Inc.*, No. 2:15-cv-04035-CAS (JEMx), 2015 WL
24 4554336, at *4 (C.D. Cal. July 27, 2015) (estimating \$30,000 of attorneys’ fees in an
25 employment case); *Aguilar*, 2015 WL 6755199, at *7 (same).

26 Plaintiff requests attorneys’ fees, which may be granted to the prevailing party
27 in FEHA lawsuits. Cal. Gov’t Code § 12965. Because the Court assumes at this stage
28 that Plaintiff will prevail on her claims, attorneys’ fees should be included in the

1 amount in controversy. The Court therefore adheres to the decisions in other
2 employment cases in this district and includes \$30,000⁹ of attorneys' fees in the
3 amount in controversy.

4 **3. Emotional Distress and Punitive Damages**

5 Plaintiff's complaint seeks unspecified damages for emotional distress. (See
6 generally Compl.) Emotional distress damages are properly considered in the amount
7 in controversy for jurisdiction purposes. *See, e.g., Kroske*, 432 F.3d at 980; *Cain v.*
8 *Hartford Life & Acc. Ins. Co.*, 890 F. Supp. 2d 1246, 1250 (C.D. Cal. 2012); *see also*
9 *Simmons*, 209 F. Supp. 2d at 1034 ("In fact, emotional distress damages may be
10 considered when calculating the amount in controversy even where not clearly pled in
11 the complaint."). "To establish the amount of emotional distress in controversy, a
12 defendant may introduce evidence of jury verdicts in other cases." *Cain*, 890 F. Supp.
13 2d at 1250 (C.D. Cal. 2012) (citing *Rivera v. Costco Wholesale Corp.*, No. C 08-
14 02202 CW, 2008 WL 2740399, at *1 (N.D. Cal. July 11, 2008)). Little Caesars cites
15 several jury verdicts awarding emotional distress damages in other employment
16 discrimination and failure to accommodate cases, where emotional distress damages
17 ranged from \$500,000 to \$2.5 million. (See Dkt. No. 35 at 9.)

18 Plaintiff also seeks an unspecified amount in punitive damages. "It is well
19 established that punitive damages are part of the amount in controversy" for purposes
20 of establishing diversity jurisdiction. *Gibson v. Chrysler Corp.*, 261 F.3d 927, 945
21 (9th Cir. 2001); *see Bell v. Preferred Life Assur. Soc. of Montgomery, Ala.*, 320 U.S.
22 238, 240 (1943). In order to establish probable punitive damages, a party asserting
23 federal diversity jurisdiction may also introduce evidence of jury verdicts in cases
24 involving analogous facts." *Surber v. Reliance Nat. Indem. Co.*, 110 F. Supp. 2d
25 1227, 1232 (N.D. Cal. 2000). Defendants also cite jury verdicts awarding punitive
26 damages from several other cases. (See Dkt. No. 35 at 9.)

27
28 ⁹ The Court finds \$30,000 is a conservative estimate for attorneys' fees in this case
given that Plaintiff's counsel charges \$450 per hour. (See Dkt. No. 34-1.)

Without deciding whether this case is sufficiently analogous to those cited by Little Caesars, or quantifying the exact value of Plaintiff's claims for emotional distress or punitive damages, the Court recognizes that emotional distress and punitive damages are more likely than not to be more than nominal. *See Hurd v. Am. Income Life Ins.*, No. CV-13-05205 RSWL-MRW, 2013 WL 5575073, at *7 (C.D. Cal. Oct. 10, 2013) ("Punitive damages and emotional distress damages in disability discrimination cases can be 'substantial' even when lost wages fall short of the jurisdictional minimum."). In other words, they are likely worth at least \$1 each.

4. Aggregation of Claims

The amount in controversy, for purposes of jurisdiction, is the total "amount at stake in the underlying litigation." *Theis*, 400 F.3d at 662. As stated above, the Court finds that there is at least \$47,201 in lost wages, \$30,000 in attorneys' fees, \$1 in emotional distress, and \$1 in punitive damages at stake. Accordingly, the Court is persuaded that Little Caesars has established by a preponderance of the evidence that, when viewed in combination, Plaintiff's claims exceed \$75,000, exclusive of interest and costs.

D. The Individual Defendants Did Not Have to Join in the Removal

Plaintiff also argues that removal is precluded because all defendants must join in removal and the failure of the Individual Defendants to join in the notice precludes removal. (Mot. to Remand at 5); *see Hewitt v. City of Stanton*, 798 F.2d 1230, 1232-1233 (9th Cir. 1986). However, the Ninth Circuit has interpreted this "rule" of joinder to not apply when the defendants who do not join in the removal have not been served in the state action. *Salveson v. W. States Bankcard Ass'n*, 731 F.2d 1423, 1429 (9th Cir. 1984) ("Our circuit rule is that a party not served need not be joined."). The Court lacks jurisdiction over a defendant if the defendant has not been properly served. *See Dodco, Inc. v. Am. Bonding Co.*, 7 F.3d 1387, 1388.

1 In determining the validity of service made prior to removal, the Court must
2 apply the law of the state under which service was made.¹⁰ *See Allen v. Ferguson*, 791
3 F.2d 611, 616 (7th Cir. 1986). Pursuant to California law, service on an individual
4 may be effectuated by: “(1) personal delivery of the summons and complaint to the
5 individual to be served or to an authorized agent; (2) leaving a copy of the summons
6 and complaint with a responsible person at the individual’s home, office, or mailing
7 address and thereafter mailing a copy to the individual at such home, office, or
8 mailing address [i.e., substituted service], or (3) mailing a copy to the individual with
9 a notice and acknowledgment.” *Littlejohn v. Denno*, 9 F.3d 1552 (9th Cir. 1993)
10 (citing Cal. Code Civ. P. §§ 415.10, 415.20, 415.30, & 416.90).

11 Here, Gary Swanberg from One Legal made three attempts to serve each
12 Individual Defendant. (Dkt. No. 15-1; Rodriguez Decl., Ex. A; Dkt No. 17-1,
13 Rodriguez Decl, Ex. A.) In his Declarations of Due Diligence, Swanberg notes that he
14 tried to serve Kirkpatrick three times (on August 4, 2018, August 6, 2018, and August
15 9, 2018) and Rodriguez three times (on August 5, 6, and 9) at Little Caesars store
16 located in Corona, California. (*Id.*) The declarations further note that various Little
17 Caesars’s employees told Swanberg that Kirkpatrick and Rodriguez did not work at
18 that location. (*Id.*) Swanberg did not attempt to serve Kirkpatrick or Rodriguez at
19 their residences, nor is there any indication that Plaintiff attempted to determine their
20 home addresses. (Dkt. No. 16-1, Rodriguez Decl. ¶ 3; Dkt. No. 17-1, Rodriguez Decl.
21 ¶ 3.) It appears Swanberg left copies of the complaints and summonses with Brittney
22 Jones, the manager of Little Caesars in Corona where Kirkpatrick and Rodriguez are
23 no longer employed. (Dkt. No. 16-1, Rodriguez Decl. ¶ 5; Dkt. No. 17-1, Rodriguez
24 Decl. ¶ 5.) Little Caesars asserts Rodriguez has not worked for Little Caesars for
25 more than two years. (Dkt. No. 17 at 1.) Little Caesars further alleges “Plaintiff has
26 made no further attempts to provide [the Individual Defendants] with the

28 ¹⁰ Service after removal is governed by federal law.

1 summons[es] and complaint[s].” (Dkt. No. 16-1, Rodriguez Decl. ¶ 6; Dkt. No. 17-1,
2 Rodriguez Decl. ¶ 6.)

3 The Individual Defendants were not personally served and Brittney Jones is not
4 authorized to receive service on their behalf. Substituted service does not apply
5 because Little Caesars in Coronado is not the Individual Defendants’ “home, office, or
6 mailing address.” The Court is troubled by the fact that neither party has presented
7 any evidence suggesting the Individual Defendants have actual notice of this lawsuit.

8 The Court therefore finds that, in addition to being sham defendants, the
9 Individual Defendants were not properly served. Because the Individual Defendants
10 were not properly served by the date of removal (and have yet to be properly served),
11 the non-joinder of the Individual Defendants in the removal notice is irrelevant.

12 V. CONCLUSION

13 The Court (1) **DENIES** Plaintiff’s Motion to Remand and Plaintiff’s request for
14 attorneys’ fees; (2) **GRANTS** Little Caesars’s Motion to Dismiss the Individual
15 Defendants and dismisses the Individual Defendants **WITH PREJUDICE**; (3)
16 **DENIES** Little Caesars’s Motion to Quash for Insufficient Service of Summons on
17 Individual Defendant Amanda Kirkpatrick as moot; and (4) **DENIES** Little Caesars’s
18 Motion to Quash for Insufficient Service of Summons on Individual Defendant Ruby
19 Rodriguez as moot.

20
21 **IT IS SO ORDERED.**

22 Dated: November 02, 2018



24 HONORABLE ANDRÉ BIROTTE JR.
25 UNITED STATES DISTRICT COURT JUDGE
26
27
28